IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SCOTT BRYAN SILVAS, Appellant.	No. 37936-8-II UNPUBLISHED OPINION

Van Deren, C.J.—Scott Silvas appeals his convictions for drug possession and driving under the influence (DUI) entered by the trial court after a bench trial. The trial court conducted the bench trial after revoking Silvas's pretrial diversion agreement due to his failure to comply with the terms of the agreement. He argues that the evidence is insufficient to convict him because the prosecutor did not submit, and the trial court did not admit, any evidence against him at trial. He also contends that the convictions were entered in violation of his constitutional right to due process because, when he signed the diversion agreement, the trial court did not inform him of probation and community custody terms that would be imposed at sentencing. We remand to the trial court to reconstruct the record because the record is insufficient for our review of Silvas's claim of insufficient evidence.

FACTS

The State charged Scott Silvas with possession of a controlled substance other than marijuana, in violation of RCW 69.50.4013(1), and DUI, in violation of RCW 46.61.502(1). On May 16, 2007, Silvas signed a pretrial diversion agreement and a declaration, waiver of jury trial, and stipulation to facts sufficient for a finding of guilt. The declaration states, in relevant part:

> I stipulate that this Court may determine my guilt or innocence for the charge(s) presently filed against me in this matter based upon the law enforcement/investigating agency's reports on which this prosecution was based[ ] and I stipulate that the facts contained within the investigation reports are sufficient for a trier of fact to find me guilty of the charge(s) presently filed against me in this matter.

Clerk's Papers (CP) at 27.

The trial court reviewed the diversion agreement and Silvas's declaration with him and Silvas stated that he understood them. The documents informed Silvas of the possible terms of confinement on the two charges but neither the documents nor the trial court informed Silvas of the potential probation term for the DUI charge or the community custody term for the possession charge.

When Silvas did not appear at a diversion review hearing set for April 4, 2008, the trial court issued a bench warrant. Silvas appeared in superior court on May 12, 2008. The State informed the trial court that the prosecutor and the agency responsible for administering the diversion program believed that Silvas's diversion should be revoked.

At a second hearing, the trial court revoked the diversion without Silvas's objection. The court informed Silvas that the revocation meant that "we are going to have a mini trial, at which time I am going to read the police reports and decide whether you are guilty or not. If I find you

guilty, we will have a sentencing." Report of Proceedings (RP) (May 16, 2008) at 2.

At the "mini trial" on June 5, 2008, defense counsel stated that "this matter is on for stipulated trial. The state's files and the police reports [Tape Inaudible] the Court would have no objection to that [Tape Inaudible]. As long as we identify the page numbers [Tape Inaudible] of the [Tape Inaudible] copies, I'd appreciate it." RP (June 5, 2008) at 2 (alterations in original). The trial court, after stating that it reviewed "materials that have been submitted and presented to the Court," found Silvas guilty of both offenses. RP (June 5, 2008) at 2. It sentenced Silvas to 30 days in jail and 12 months community custody for the possession conviction and 365 days, with 361 days suspended, in jail and five years of probation for the DUI conviction.

ANALYSIS

Silvas raises two arguments on appeal. First, he argues that the evidence is insufficient to convict him because "the prosecutor did not submit any evidence, and none was admitted at trial." Br. of Appellant at 8-9. Second, Silvas contends that the convictions were entered in violation of his constitutional right to due process because the trial court did not inform him of possible probation and community custody terms at the time he signed the diversion agreement.

I. Sufficiency of the Evidence

Silvas argues that the evidence was insufficient to convict him because the trial court did not admit any police or other reports into evidence at the bench trial. The State does not dispute that the police reports were not admitted as trial exhibits but asserts that the record demonstrates that the trial court reviewed the police reports and relied upon them to convict Silvas. It asks us to infer that the trial court reviewed the police reports.[1]

[1] Respondent's brief includes exhibit B, a copy of a cover letter dated June 2, 2008, sent to the judge and defense counsel. The letter indicates that the police reports were sent with it as

We conclude that, in this circumstance where Silvas stipulated that the information contained in the police reports was sufficient to convict him, the actual reports need not be admitted into evidence because the substance of the reports is immaterial. Silvas cannot dispute the truth of the police reports. What is material is some assurance that the reports were before the trial court and that the trial court reviewed them and relied upon them to enter the guilty verdicts.

Here, however, the record is insufficient to allow us to review whether the police reports or other investigation reports were examined by the trial court. The inaudible portions of the record during which Silvas's counsel discusses the State's files and reports indicate that some documents were presented to the trial court and that defense counsel did not object to the trial court's review of those documents, as long as they were indicated with particularity for the record. Ironically, that is exactly what did not occur and the trial court did not later clarify the inaudible portion of the record when it merely stated it had reviewed "materials that have been submitted and presented to the Court," without specifying which materials it reviewed. RP (June 5, 2008) at 2. Review is further complicated by the fact that the record before us does not contain the trial court's findings of fact and conclusions of law as required by CrR 6.1(d).[2]

Article 1, section 22 of the Washington Constitution entitles a criminal defendant to a "'record of sufficient completeness'" to allow appellate review of potential errors. *State v.*

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enclosures. This letter is not in the record on appeal.

[2] CrR 6.1(d) states:

> In a case tried without a jury, the court shall enter findings of fact and conclusions of law. In giving the decision, the facts found and the conclusions of law shall be separately stated. The court shall enter such findings of fact and conclusions of law only upon 5 days' notice of presentation to the parties.

Classen, 143 Wn. App. 45, 54, 176 P.3d 582 (internal quotation marks omitted) (quoting *State v. Larson*, 62 Wn.2d 64, 66, 381 P.2d 120 (1963)), *review denied* 164 Wn.2d 1016 (2008). "'A record of sufficient completeness does not translate automatically into a complete verbatim transcript.'" *State v. Tilton*, 149 Wn.2d 775, 781, 72 P.3d 735 (2003) (internal quotations omitted) (quoting *Mayer v. City of Chicago*, 404 U.S. 189, 194, 92 S. Ct. 410, 30 L. Ed. 372 (1071)). The absence of a portion of the record is not reversible error unless the defendant can demonstrate prejudice. *State v. Miller*, 40 Wn. App. 483, 488, 698 P.2d 1123 (1985).

"The usual remedy for a defective record is to supplement the record with appropriate affidavits" and have the judge who heard the case resolve any discrepancies. But "where the affidavits do not produce a record which satisfactorily recounts the events material to the issues on appeal," a new trial must be ordered. *Tilton*, 149 Wn.2d at 783. We have no such affidavits or reconstructed record before us on appeal. *E.g.*, RAP 9.4.[3]

Because the inaudible portions of the record are material to determining the evidence the trial court relied on in convicting Silvas and because the trial court did not enter the required findings of fact and conclusions of law, we conclude that the matter must be remanded to settle the record. "[I]n most cases with the resources available to the trial court an adequate narrative statement of facts can be prepared." *Larson*, 62 Wn.2d at 68 (Hill, J., concurring in the result).

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[3] RAP 9.4 states:

> The parties may prepare and sign an agreed report of proceedings setting forth only so many of the facts averred and proved or sought to be proved as are essential to the decision of the issues presented for review. The agreed report of proceedings must include only matters which were actually before the trial court. An agreed report of proceedings should be in the same form as a verbatim report, as provided in rule 9.2(e) and (f). An agreed report of proceedings may be prepared if either the court reporter's notes or the videotape of the proceeding being reviewed are lost or damaged.

Consequently, we remand this matter to the trial court for the purpose of reconstructing the trial record under the procedures set out in RAP 9.3, RAP 9.4 and RAP 9.5. As an example, in *Classen*:

> the parties and the trial court reconstructed the record, using notes and recollections of the clerk, bailiff, both parties, and intermittent footage of courtroom proceedings produced by the news media. The parties signed an agreed report of proceedings, stating the reconstruction was accurate to the best of each party's recollection, and the trial court signed its approval of the reconstruction.

143 Wn. App. at 53-54. We cannot address whether the reconstructed record "satisfactorily recounts the events material to the issues on appeal" until a reconstructed record is presented to us. *Tilton*, 149 Wn.2d at 783.

II. Due Process Violation

Silvas also argues that the trial court violated his due process rights by failing to inform him of all of the consequences of entering into the diversion agreement. Silvas maintains that his agreement to an abbreviated bench trial is equivalent to a guilty plea and that he is entitled to receive the same protections given to people who plead guilty, including the right to be informed of all of the direct consequences of their plea. The State responds that *State v. Drum*, 143 Wn. App. 608, 618-19, 181 P.3d 18, *review granted*, 164 Wn.2d 1025 (2008) controls.

Although we do not expect this issue to arise on remand, we agree with the State that *Drum* controls the outcome. In *Drum*, we determined that the trial court's failure to inform Drum of the many consequences for his failure to comply with a drug court contract, including possible sentences and the term of community custody, did not violate Drum's due process rights. 143 Wn. App. at 620. "Deferred prosecution is not tantamount to a guilty plea; it is a form of preconviction sentencing or probation." *City of Richland v. Michel*, 89 Wn. App. 764, 769-70,

950 P.2d 10 (1998).

The agreement in *Drum* was a drug court agreement but we find no reason to distinguish a diversion agreement. Both agreements center on the premise of deferred prosecution in return for a defendant's compliance with the agreement. *See Drum*, 143 Wn. App. at 619; *see also City of Kent v. Jenkins*, 99 Wn. App. 287, 290, 992 P.2d 1045 (2000). Consequently, Silvas's claim that his convictions were entered in violation of his due process rights fails.

We remand to the trial court to reconstruct the record or for further proceedings as necessary because the record is insufficient for our review of Silvas's claim that the State did not present sufficient evidence to support his convictions for drug possession and DUI. We instruct that the record be presented to us within 60 days of the date of this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J.

We concur:

Bridgewater, J.

Penoyar, J.